

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

File No. **11-20129**

-VS-

Hon. **Robert H. Cleland**

SCOTT WILLIAM SUTHERLAND (D-1),

Defendant.

UNITED STATES OF AMERICA,

Plaintiff,

File No. **11-20066**

-VS-

Hon. **Robert H. Cleland**

JEFF GARVIN SMITH, et. al.,

Defendants.

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**MOTION TO PRODUCE ALL CO-
DEFENDANTS' STATEMENTS THAT THE
GOVERNMENT INTENDS OFFERING IN EVIDENCE**

Defendant SCOTT WILLIAM SUTHERLAND (D-1), by and through counsel, CRAIG A. DALY, P.C., who moves this Court for the production of all Co-Defendants' statements that the government intends offering in evidence, for the following reasons:

1. The government has charged the Defendant and forty (40) other individuals in a multi-count indictment. Nine (9) of these Co-Defendants are scheduled to go to trial with Defendant Sutherland.

2. It appears that several Co-Defendants have made statement(s) to law enforcement implicating themselves and possibly Defendant Sutherland, either directly or indirectly.

3. That if any such statements exist, these statements would give rise for a motion for severance or other relief in the form of a Motion in Limine regarding violation of Defendant Sutherland's confrontation rights.

4. A hearing on this motion may not be deemed mandatory. However, Defendant Sutherland requests a hearing.

5. Defendant Sutherland waives his personal presence should the Court conduct a hearing.

6. Concurrence with the government was sought on May 9, 2014 and the government has "reserved concurrence or objection until further review."

7. The facts and law in support of this motion are more fully set forth in the accompanying Brief, which is incorporated by reference into this motion.

WHEREFORE, the Defendant SCOTT WILLIAM SUTHERLAND, respectfully requests that the Court order the Government to provide to Defendant Sutherland any statement made by a Co-Defendant which the government intends offering into evidence during its case in chief, during cross-examination of any defendant who might elect to testify, or in rebuttal.

Respectfully submitted,

s/*Craig A. Daly*

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Dated: May 16, 2014

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**BRIEF IN SUPPORT OF
MOTION TO PRODUCE ALL CO-
DEFENDANTS' STATEMENTS THAT THE
GOVERNMENT INTENDS OFFERING IN EVIDENCE**

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STATEMENT OF ISSUES

SHOULD DEFENDANT SUTHERLAND BE ALLOWED TO INSPECT OTHER CO-DEFENDANTS' STATEMENTS BEFORE TRIAL IN ORDER TO DETERMINE IF PREJUDICE WOULD RESULT FROM THE ADMISSION OF THOSE STATEMENTS AT TRIAL?

STATEMENT OF CONTROLLING AUTHORITY

Fed. R. Crim. P. 14 provides for inspection of Co-Defendants' statements to determine prejudice. In light of this rule, the Defendant's proposed procedure is therefore both acceptable and more efficient than requiring an *in camera* inspection.

ARGUMENT

DEFENDANT SUTHERLAND SHOULD BE ALLOWED TO INSPECT OTHER CO-DEFENDANTS' STATEMENTS BEFORE TRIAL IN ORDER TO DETERMINE IF PREJUDICE WOULD RESULT FROM THE ADMISSION OF THOSE STATEMENTS AT TRIAL.

Rule 14(b) of the Federal Rules of Criminal Procedures contemplates that the government may be ordered to produce defendants' statements, at least, in camera in order that the court may determine which statements are subject to exclusion under *Bruton v. United States*, 391 U.S. 123, 127 (1968).

In *Bruton*, the Supreme Court held that the admission of a defendant's confession, which facially incriminates a co-defendant in a joint trial, violates a co-defendant's Sixth Amendment confrontation right when the defendant who made the statement does not testify at trial. Although "in some contexts" a limiting instruction can suffice regarding "inadmissible hearsay or other evidence," in the context of an incriminating extra judicial statement of a co-defendant the "risk that the jury will not, or cannot, follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id. at 135*. In short, a limiting instruction could not alleviate the error. Subsequently, the Court allowed redacted confessions that were "not incriminating

on its face” and replacing the defendant’s name with a blank. *Richardson v. Marsh*, 481 U.S. 100 (1987); *Gray v. Maryland*, 523 U.S. 185, 192 (1998).

However, more recently, the Supreme Court set forth a rule that undoubtedly undercuts the principles in *Richardson* and *Gray* in *Crawford v. United States*, 541 U.S. 36, 40 (2004). Disclosure is now necessary because any “testimonial” statement by a co-defendant, whether incriminating to another defendant, is excludable, unless that defendant testifies at trial and is subject to cross-examination, *id. at 40*, (admission of a co-defendant’s custodial statement denied defendant his Sixth Amendment right to confrontation). Redaction will not satisfy the dictates of *Crawford*.

As presumably each party knows if he gave a statement, there is no harm in advising every other defendant that a non-cooperating co-defendant has provided a statement.

The procedure contemplated by the Defendant Sutherland is the best use of resources and the one most likely to avoid last minute pre-trial or, far worse, mid-trial problems and motions for mistrial.

RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, Defendant SCOTT WILLIAM SUTHERLAND (D-1), requests this Honorable Court order the government to provide Defendant Sutherland any statement made by a Co-Defendant which the government intends offering into evidence during its case in chief, during cross-examination of any defendant who might elect to testify, or in rebuttal.

Respectfully submitted,

s/*Craig A. Daly*

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CERTIFICATE OF SERVICE

I, **CRAIG A. DALY, P.C.**, hereby certify that on the **16th** day of **May 2014**, I electronically filed **Motion to Produce All Co-Defendants' Statements that the Government Intends Offering in Evidence and Brief in Support** with the Clerk of the Court using the ECF system which will send notification of such filing to the following: **Hon. Robert H. Cleland and Attorneys of Record.**

Respectfully submitted,

s/Craig A. Daly

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